



**Njeru & another v Office of the Director of Public Prosecutions
& 3 others; Njeru Industries Limited (Interested Party) (Petition
E010 of 2022) [2022] KEHC 12798 (KLR) (31 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12798 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

PETITION E010 OF 2022

EM MURIITHI, J

AUGUST 31, 2022

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
& FREEDOMS UNDER ARTICLES 2, 10, 22, 23, 26, 27, 29, 47, 50, 57, 157, 159, 258 &
259 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: RULES 4, 10, 11, 13 & 20 OF THE CONSTITUTION
(SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS OF THE INDIVIDUAL) HIGH
COURT PRACTICE AND PROCEDURE RULES 2013**

AND

IN THE MATTER OF: SECTION 4 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015.

AND

**IN THE MATTER OF: THE OFFICE OF THE DIRECTOR
OF PUBLIC PROSECUTIONS ACT NO. 2 OF 2013**

BETWEEN

SIGISMOND K NJERU 1ST PETITIONER

PROTASIO NJERU 2ND PETITIONER

AND

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 3RD RESPONDENT



AND

RULING

1. By Notice of Motion dated June 29, 2022, the petitioners seek an order that:-

“That pending the hearing and determination of this petition the honourable court be and is hereby pleased to issue a conservatory order temporarily, staying the 1st respondents’ decision to prosecute the applicants herein as communicated vide summons dated June 2, 2022 requiring Sigismund K Njeru and Protasio Njeru to attend court on July 12, 2022 in Meru Criminal Case no E1743 of 2022 and/or this court be pleased to restrain the respondents by themselves, agents, officers or employees from arresting, arraigning, charging and/or prosecuting the petitioners/applicant herein Sigismund K Njeru and Protasio Njeru on account of Meru Criminal Case no E1743 of 2022.”

It was established at hearing of the application that the petitioners had already taken plea and the trial set before the trial court on September 13, 2022.

2. The charge preferred against the two petitioners and another, Henry Paul Ileri Njeru, as directors of a company Njeru Industries Limited is for obtaining goods by false pretence contrary to section 312 as read with 313 of the *Penal Code*, with particulars of the offence as follows:-

“1. Sigismund Karwirwa Njeru 2. Henry Paul Ileri Njru 3. Protasio Njeru: On diverse dates between July 28, 2017 and September 8, 2017 at Njeru Industries Ltd in Kinoru, Imenti North Sub-County, within Meru county being the directors of the said company, with intend to defraud for obtained 950 mild steel bars and 590 mild steel plates all valued at kshs 2,721,555/= (Two Million seven hundred and twenty one thousand five hundred and fifty five shillings only) the property of Vinit Salva by falsely pretending that you were in a position to pay, a fact you knew to be false.”

3. The principal grounds upon which the application is based as set out, among others, in the application are:-

1. The petitioner/applicants are elderly at 78 and 83 years respectively and in deteriorating health.
2. That the dispute over which the applicants have been charged relate to a civil and contractual endeavor between the complainant in the criminal proceedings, Galaxy Merchants Ltd through Vinit Salva and Njeru Industries Ltd and, therefore, the criminal prosecution is an abuse of process.
3. The prosecution of the applicants is improper for the reason that the applicants herein delegated their authority to act on behalf of the company (interested party herein) to Henry Paul Ileri, a co-director, and the said co-director is fit to solely face trial on behalf of the interested party.

4. By a Replying Affidavit sworn by the investigating officer on August 1, 22, the DPP sets up its opposition to the Petition and the application on the grounds that the police and the DPP have acted



within their constitutional and statutory powers and they have not violated the applicants' rights or rules of natural justice. On the question of charging all the three directors of the company (interested party herein), the DPP responds that they acted on a search into the directors of Njeru Industries Ltd which showed the 1st petitioner, 2nd petitioner, and Henry Paul Ileri Njeru as directors, by letter from Business Registration Service dated August 31, 2021.

The Turquand effect

5. The circumstances of this case are reminiscent of the principle implied in the rule in Turquand's case, (*Royal British Bank v. Turquand* (1856) 6 E & B 327) that persons dealing with a company are not required to know the internal management of the company. The DPP in considering an offence committed by the company herein may proceed against the directors as registered at the company registry notwithstanding an internal resolution of the shareholders appointing one director to manage the affairs of the company as averred by the petitioners herein.
6. However, having been made aware of the resolution of the company directors of March 18, 2015 when the petitioners delegated their authority to the co-director Henry Paul Ileri, the DPP may properly amend the charge to proceed only against the executive director of the company.

Independence of the DPP

7. Article 157(10) of *the Constitution* gives the DPP operational independence by providing that "the Director of Public Prosecutors shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority."
8. It is now settled that the court shall only interfere with the prosecutorial independence of the DPP in cases where the prosecution violates the rights of any person or it is pursued for improper or ulterior motives or is otherwise an abuse of the process of the court, See for example the decision of this court in Nairobi HC Pet No 523 of 2014, *Christina Gakubi Kubai v DPP* [2016] eKLR Nairobi, as follows:-

"The prosecutorial mandate and abuse of the legal process

38. I agree with the position that the police and the DPP have respectively constitutional investigation and prosecutorial powers under articles 245 and 157 of the *Constitution*. Article 157 (10) of the *Constitution* provides for the independent prosecutorial powers of the DPP in terms as follows:

"(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

38. Although both powers of investigations and prosecution are to be exercised independently without direction or control from any person, this does not preclude the High Court as a constitutional court from terminating investigations and prosecution undertaken in breach of rights and fundamental freedoms, public interest or in abuse of the legal process. The position was first established in Kenya by the High Court (Madan Ag CJ, Aganyanya & Gicheru, JJ) in *Githunguri v Republic* (1986) KLR 1 and affirmed subsequently by the Court of Appeal (Tunoi, Githinji & Deverrel,



JJA) in *Joram Mwenda Guantai v The Chief Magistrate*, Nairobi [2007] eKLR when it held that the High Court has an inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court as follows:

“Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. It was succinctly put in *Stanley Munga Githunguri vs Republic* [1985] KLR 91 that if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious the judge has the power to intervene and that the High Court has an inherent power and a duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court. This dictum is now an everyday edict in our courts and we are indeed surprised that the learned judge was shy to so declare.”

40. It is true that courts have generally held this view of law as regards the court’s power to intervene in appropriate cases. For instance, in a ruling for conservatory order to stay prosecution in Nairobi Petition No 442 of 2016, *Shivji Jadvā Parbat and 2 Ors v The Hon Attorney General and 2 Ors*, this court observed that –

“22. It is clear that the police have general powers of investigation of crime under article 245 (4) (a) of the *Constitution* and the DPP a general power to prosecute offenders subject only to Constitution and the requirements of public interest under article 157 (11) of the *Constitution*. The test appears therefore to be whether there is demonstrated a reasonable justification to commence investigation and prosecution for a crime. Where however, it can be shown that the prosecution is being carried out some purpose ulterior to the objects of the criminal process to enforce the law and to prosecute offenders, as to amount to what the constitution in article 157 (11) calls abuse of the legal process, the court must intervene to halt such abuse.”

41. Most recently, in *Director of Public Prosecutions v Justus Mwendwa Kathenge & 2 others* [2016] eKLR delivered on November 25, 2016, the Court of Appeal has restated the principle that the powers of the DPP to prosecute are not absolute, and may be halted in cases of abuse of process, and held that:

“From the days of *Githunguri* [(1986) KLR 1], the prosecutorial powers, then exercised by the Attorney General, was held to have limits; that it must never be abused, never exercised oppressively, maliciously or against the public interest. The court in that decision emphasized that, where it was clear that the power to prosecute was being misused, the court, under its inherent jurisdiction would stop such prosecution as it would amount to an abuse of the process of the court. This holding has since been consistently followed. See also *Mohammed Gulam Hussein Fazal & another v The Chief Magistrate Court*, Nairobi & another H C Misc Application No



367 of 2005, and *Peter George Antony D'costa v A G & Another*,
Petition No 83 of 2010.”

42. Similarly in Australia, the High Court of Australia in *Williams v Spautz* [1992] HCA 34; 174 CLR 509; 66 ALJR 585; 107 ALR 635; 61 A Crim R 431 long held that abuse of process is a ground for termination of criminal proceedings as follows:

“15. It is well established that Australian superior courts have inherent jurisdiction to stay proceedings which are an abuse of process (5) *Clyne v NSW Bar Association* [19601 (1960) 104 CLR 186, at p 201; *Barton v The Queen* [19801 HCA 48; (1080) 147 CLR 25, at pp 96, 107, 116; *Jago*. Although the term 'inherent jurisdiction' has acquired common usage in the present context, the question is strictly one of the power of a court to stay proceedings. That power arises from the need for the court to be able to exercise effectively the jurisdiction which the court has to dispose of the proceedings. The existence of that jurisdiction has long been recognized by the House of Lords (6) *Metropolitan Bank v Pooley* (1885)10 App Cas 210; *Connelly v D P P* (1964) AC 1254; *Reg v Humphrys (1977) AC 1*.The jurisdiction extends to both civil and criminal proceedings. As Lord Morris of Borth-y-Gest observed in *Connelly v D P P* (7) (1964) AC, at p 1301.

“(A) court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.”

43. The position in England and Wales is no different. At paragraphs 4-48 and 4-49 p 347, *Archibold, Criminal Pleading, Evidence and Practice*, 2006 ed notes as follows:

“Abuse of process

a. Jurisdiction

General

In *Connelly v DPP* [1964] A. C 1254-1355, Lord Devlin added a fifth ground to the list set out in *ex p. Downes*, ante viz. where particular criminal proceedings institute an abuse of the courts process, see also Lord Pearce at pp 1361, 1364 and Lord Reid at p. 1296, but cf, Lord Morris at pp 1300-1302 and Lord Hodson at pp 1335-1338 what all their lordships do seem to agree upon is that the court has a general and inherent power to protect its process from abuse. This power must include power to safeguard an accused person from oppression or prejudice: Lord Monis, ante; Lord Devlin at p 1347; Lord Pearce, ante.



The views expressed in *Connelly*, ante, were considered, obiter, in *DPP v Humphrys*[1977] AC 1, HL. Only Lords Dilhorne, Salmon and Edmund-Davies considered the point. Lord Salmon and Lord Edmund-Davies concurred with the views expressed by Devlin and Lord Pearce in *Connelly*, while Lord Dilhorne supported the narrower approach adopted by Lord Morris and Lord Hodson.

"I respectfully agree with [Lord Dilhorne] that a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of power to intervene. Fortunately such prosecutions are hardly ever brought but the power of the court to prevent them is, in my view, of great constitutional importance and should be a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the court of the power to which I have referred." (per Lord Salmon at p. 46C-F).

44. In addition, article 157 of the *Constitution* of Kenya which gives the DPP the power to institute and undertake criminal proceedings in respect of any offence is subject to sub-article (11) as follows:

"(11) In exercising the powers conferred by this article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process."

Section 193 A of the Criminal Procedure Code, which provides that the institution of civil proceedings does not preclude the state from instituting and maintaining criminal proceedings against a party with respect to an issue which is also directly in issue in a pending civil suit is, as a statutory stipulation, similarly subject to abuse of process principle of article 157 (11) of the *Constitution*."

9. The petitioners contend that the decision to charge all the directors of the interested party company is made in bad faith and against the petitioners legitimate expectation not to be charged for the obligations of the interested party when their co-director Henry Paul Ileri is fit to solely face trial on behalf of the interested party.
10. The DPP is, however, entitled under the principle in *Turquand's* case and on company law principle that a company acts through the actions of its directors to proceed against the company through all its registered directors.
11. However, in view of the company's resolution of March 18, 2015 delegating their authority of the 2 petitioners directors to their sole co-director and on account of their elderly age and failing health, the DPP may, in exercise of its mandate under article 157 (11) of the *Constitution* to consider "the public



interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process”, find it appropriate to proceed against the co-director who exercising executive authority of the interested party.

12. The court may not, however, direct the DPP in the circumstances of their case to exercise his discretion in a particular manner, there having not been demonstrated an arguable case of breach of the provisions of article 157 (11) of the *Constitution*.

Orders

13. Accordingly, for the reason set out above, the petitioners’ application for conservatory order to stay their prosecution is declined.
14. There shall be no order on costs.

DATED AND DELIVERED THIS 31ST DAY OF AUGUST 2022.

EDWARD M MURIITHI

JUDGE

Appearances:

Mr H Kirimi for applicant.

Ms Nandwa for 1st respondents.

